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No. 75-1015

In the Supreme Court of the United States

OCTOBER TERM, 1975

RALSTON PURINA COMPANY, ET AL.,
APPELLANTS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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Pursuant to Rule 10(4) of the Rules of this Court, appellees the United States of America and the Interstate Commerce Commission submit this joint statement of position.

1. In early 1973 four railroads in the southern territory proposed to increase transit charges on vegetable oil, cake or meal and related articles. Several shippers protested, and the Commission, pursuant to Section 15(7) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U.S.C. 15(7)), suspended the tariff and ordered an investigation. The Commission found that evidence showed that the higher rates would divert enough traffic to trucks to cause a net revenue loss (J.S. App. 22-23). It also concluded that the proponent

railroads had failed to carry their burden of showing that the proposed higher charges would be just and reasonable (J.S. App. 24). The Commission directed the railroads to cancel the schedules increasing the rates (*ibid.*).

The railroads sought review in a three-judge district court, which set aside the Commission's order (397 F. Supp. 607; J.S. App. 1-8). After discussing the evidence concerning loss of revenue by diversion, the court observed (J.S. App. 7) that:

> there is not substantial evidence to support the Commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable. To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.

The court acknowledged that the Commission's decision was supported by evidence. It discounted this evidence, however, because it was "testimony from representatives of the four shipper[s]", because "[t]heir statements are predictions, conjectures and opinions of what might happen", and because "they are self-serving" (J.S. App. 6).

The court set aside the Commission's order without remanding the case to the agency, concluding that "a remand of this case to the Interstate Commerce Commission would not serve any useful purpose" (J.S. App. 7-8). The Commission then asked the court to remand the case. The court declined to do so (J.S. App. 27).

2. Although the district court's decision was adverse, we did not appeal for two reasons. First, although the district court declined to remand the case to the Commission for further proceedings, its judgment

does not explicitly preclude the Commission (on its motion or on request of any protesting shippers) from instituting further proceedings, taking new evidence, and making a fresh decision whether the rates in question are just and reasonable. Indeed, the district court would have no power to preclude further proceedings before the Commission. See *United States* v. *Saskatchewan Minerals,* 385 U.S. 94; *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U.S. 800, 817-826; cf. 49 U.S.C. 13. The Commission therefore believes that the district court's decision does not inevitably declare that the rates in question are just and reasonable. Second, the decision of the district court purports to turn simply upon the substantiality of the evidence in this particular proceeding, and we believe that it is not necessary to present to this Court for plenary resolution all decisions of this sort, however incorrect they may be.[1]

The shippers have appealed, however, and the case is now before the Court. Although we remain of the view that plenary consideration is unnecessary, we also believe that the district court's decision is patently incorrect. We therefore urge that its judgment be reversed summarily.[2]

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[1]Congress has taken steps to make review of Interstate Commerce Commission cases less burdensome to this Court. Pub. L. 93-584, 88 Stat. 1917, provides that after February 28, 1975, review of the Commission's orders is in the courts of appeals, with review in this Court by certiorari. The complaint in the instant case was filed before the effective date of this statute and so is governed by the old procedure, which required such complaints to be heard by three-judge district courts and provided for review by appeal to this Court.

[2]Cf. *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League of America, Inc.,* No. 75-4, decided November 11, 1975, in which we also declined to seek review but suggested summary reversal after the private parties brought the case to this Court.

We agree with appellants (J.S. 9-14) that the district court erred in reweighing the evidence. The district court, although claiming to set aside the Commission's order for want of substantial evidence, in fact simply disagreed with the Commission concerning the weight to be accorded conflicting evidence concerning diversion of traffic (J.S. App. 6-7). Such a disagreement cannot support its decision, for the weighing of testimony is the task of the Commission, not the reviewing court. *Alton R.R.* v. *United States,* 315 U.S. 15, 23.

We therefore respectfully submit that the judgment of the district court should be reversed.

ROBERT H. BORK,
Solicitor General.

ARTHUR J. CERRA,
General Counsel,
Interstate Commerce Commission.

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